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NO. 94-469

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

JERRY DON HOLLEY,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO OPPOSITION BRIEF OF THE UNITED STATES

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

I.

The Government seeks to justify its admitted deliberate deprivation of Petitioner's critical right to not be convicted of an act that was not an offense at the time of the act, declared by this Court in its *McNally* decision, despite Petitioner's timely and specific objection thereto, on the theory that "McNally's impact on bank fraud prosecution is of no continuing importance" since the statute

was amended in 1988 making the act of which Petitioner was convicted under the Court's charge an offense thereafter. In other words, it contends that certiorari should not be granted by this court because said conviction for an act in 1985-1986 by an ex post facto application of a 1988 statute is not likely to occur again in the future. We respectfully submit that any conviction of any American by an ex post facto application of an amendment to a statute, which makes his prior act an offense *only after* its commission, is of great importance to our jurisprudence, and thus deserving of certiorari.

II.

The Government seeks to justify the admitted denial of Petitioner's right to an affirmative presentation of his primary theory of defense, that the letter agreeing to pay $662,000 was solicited and acquired by Haass with the intent solely to take and hold said money for the use and benefit of Peoples Savings and Loan, on the theory that the charge required as part of an element that the solicitation had to be with an unlawful purpose and stated that if the Defendant believed in good faith that what he did was legal and proper he could not be found guilty. The very purpose of the affirmative charge in this case was to specifically state to the jury that it *was legal* if the Defendants acquired the letter with the intent to receive same for the sole use and benefit of the bank. That such was a defense was held by this Court in *U. S. v. Britton*, 2 S.Ct. 512, 107 U. S. 655. Haass gave express direct testimony raising this defense and his testimony was corroborated by statements he made to others at the time of the transaction. Objection to the omission of said defensive charge was specific and timely.

Though the Government, in effect, admits that the court's charge, over specific and timely objection, constructively amended the indictment by permitting conviction for three different acts other than that alleged, it seeks to justify said flagrant violations of the most fundamental constitutional safeguards of the Sixth Amendment by stating that "the indictment was read to the jury at the beginning of the trial", "the Court gave the jury a copy of the indictment during its deliberations", and that in its argument the Government had argued that Petitioner solicited $662,000 out of the transaction instead of arguing that he received the $5,000 involved in another deal shown by the Government's evidence. Obviously, juries often convict or acquit on theories raised by the evidence, but which were not argued by one of the parties. A jury is not slave to argument of the attorneys and is usually instructed that such is not evidence, which entitles the jury to exercise its own original thought as to the evidence itself. Furthermore, merely reading an indictment and delivering it to a jury does not correct obviously pointed out errors in the Court's charge. The very purpose of the Court's charge is actually to instruct laymen as to what is *actually* charged by the indictment.

IV.

The Government seeks to justify the trial court's refusal to redact the signatures of the *seven* different persons who signed on at the bottom of the indictment by its statement that they did not attest to the truth of the charges, but merely to the authenticity of the indictment. Such contention is directly contrary to the facts. These signatures were at the bottom of an instrument alleging

the Defendant's commission of the crime; they did not in any way purport to be simply a certificate of authenticity. If this is allowed then the United States Attorney's office can have every local person employed in the office who might have acquaintances or fellow church members on a jury to sign at the bottom of an indictment. No one can in good conscience justify such direct hearsay statements to a jury of the Defendant's guilt. The indictment is simply the Government's pleading. As stated in petitioner's Application, would anyone contend that a Defendant could deliver to the jury his written pleading in the case, to wit: "not guilty", with the names of seven possibly influential persons in the community signed at the bottom thereof.

V.

The Government states "after finding Petitioner not guilty of being a principal, the jury was entirely free, under the Double Jeopardy Clause, to convict Petitioner on the aiding and abetting theory". If this were so any defendant, as to a Federal offense, who is acquitted of the substantive offense, can be tried again under the theory of aiding and abetting and every defendant acquitted in a State Court of a substantive offense can later be tried for the same substantive offense under the law of parties. Such is not and has never been the law. Furthermore, this Court in *Sanabria v. U. S.*, 98 S. Ct. 2170, expressly holds the double jeopardy prohibition is not such a fragile guarantee that a single crime can be divided into separate discrete bases of liability, not defined as such be the legislature, and further holds that if two offenses were the same for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for barring consecutive prosecutions.

VI.

The Government incorrectly states that the FBI reports which were excluded from the Defendant's examination for cross examinatio[illegible]rposes were reviewed in camera by the Court of Appeals. There is nothing in the opinion that indicates such. It is a virtual certainty that the FBI reports of the plea bargained witnesses revealed their commission of many many crimes other than that alleged in this indictment, which were to be forgiven by the Government in exchange for the witnesses testimony against the Defendants in this case. Denial of Defendant's right to present the *true extent* of said *witnesses interest* in pleasing the Government constituted the highest conceivable violation of the constitutional right of confrontation set forth in *Davis v. Alaska*, 94 S.Ct. 1105.

VII.

The Government contends that a mere cautionary oral instruction during voir dire and in the middle of a trial suffices to deprive a Defendant of the right, upon proper objection or request, to have a jury instructed in the Court's final written charge not to consider the guilty pleas of co-defendants, proved many days after said prior oral instruction, as any evidence of the Defendant's guilt. Long after this oral reply of the Court to a defense objection, witnesses testified who were directly involved in the very transactions of which Petitioner was charged, and their guilty pleas to the same offense of which Petitioner stood charged were proved over objection with no cautionary instruction as to their particular pleas. Thus, Petitioner was entitled to said jury charge under all decisions, its omission

was specifically objected to, and its denial violated a fundamental right to Petitioner's certain prejudice.

WHEREFORE, Petitioner prays that a writ of certiorari be granted as prayed for in his Petition herein.

Respectfully submitted:

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CERTIFICATE

I hereby certify that three copies of the foregoing Reply to Opposition Brief of the United States have been duly mailed to counsel for the United States of America, Joel Gershowitz, United States Department of Justice, 10th & Pennsylvania Avenue, N.W., Room 2266, Washington, D.C. 20530, this 29th day of November, 1994.

W. V. DUNNAM, JR.